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No. 71-684

IN THE

Supreme Court of the United States

October Term, 1971

CITY OF COLUMBUS, OHIO, ET AL.,
Petitioners

v.

FRANK W. BOWER, ET AL.,
Respondents

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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INDEX

Questions Presented	1
Reasons for Denying a Writ	1
Conclusion	4

CASES CITED

Alfonso v. Hillsborough County Aviation Authority, 308 F. 2d. 724	2
Griggs v. Allegheny County; 369 U. S. 84	2
Lockheed Air Terminal, Inc. v. The City of Burbank, 11 Avi. Cas. 17850	2
United States v. California, 332 U. S. 19	3
United States v. Causby, 328 U. S. 256	3
United States v. Louisiana, 339 U. S. 699	3
United States v. Texas, 339 U. S. 707	3
Yearsley v. W. A. Ross Construction Co., 309 U. S. 18	3

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QUESTIONS PRESENTED

1. Where a municipality owns and operates an airport facility adjoining improved real property and where airflights from such facility cause damages to the owners of such real property, can the municipality be required to compensate the owners of such real property for their damages?

2. Where airplane overflights from a municipally owned airport cause damage to adjacent property owners, is the municipality or the United States of America the "taker" in the constitutional sense?

REASONS FOR DENYING A WRIT

This case presents no substantial federal question not heretofore decided by this Court.

The question of whether airplane overflights from a municipally owned airport may constitute an appropriation of certain rights of adjacent property owners was decided by this Court in *Griggs v. Allegheny County*, 369 U. S. 84 (1962). In that case this Honorable Court specifically considered the question of whether the "taking," requiring payment of damages, was by the municipal government which owned and operated the airport or by the federal government. The Court, on page 89 of its opinion stated that:

> "It is argued that though there was a 'taking,' someone other than respondent was the taker—the airlines or the C. A. A. acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. * * * *The federal government takes nothing; it is the local authority which decides to build an airport vel non, and where it is to be located.*" (emphasis supplied)

It is this very question which petitioners again attempt to raise; a question which was specifically decided in *Griggs*, supra. In addition, the same point was raised in *Alfonso v. Hillsborough County Aviation Authority*, 308 F. 2d. 724 (1962). In that case, the Fifth Circuit Court of Appeals stated on page 726 of its opinion that "(i)n any event, the recent decision in *Griggs v. Allegheny* clearly absolves the United States and the Federal Aviation Agency from liability."

Petitioners have cited in support of their argument the case of *Lockheed Air Terminal v. The City of Burbank*, 11 Avi. Cas. 17850 (1970). Respondents feel that such case is readily distinguishable upon its fact situation from

the instant cause. In *Lockheed*, the City of Burbank, California, had attempted to restrict interstate air carriers by imposing a curfew on the air carriers' nighttime flights. In its decision, the district court pointed out that to do so would amount to a revocation of the air carrier's Certificate of Public Convenience and Necessity, issued by an agency of the federal government. The court went on to reason that Congress had pre-empted the field insofar as regulation of air carriers was concerned and, therefore, struck down the local ordinance. In contrast to *Lockheed*, the case at bar falls squarely within the framework of this Court's decision in *Griggs v. Allegheny County*, supra. The local government, owner, operator and lessor of a municipal airport, is responsible for damages caused by overflights from its facility.

Finally, petitioners cite several cases as supportive of their theory. All are readily distinguishable from the instant case. *Yearsley v. W. A. Ross Construction Co.*, 309 U. S. 18 allowed suit against the United States in the Court of Claims by a riparian land owner. The federal government contracted with the defendant company to improve river navigation with resultant erosion of the plaintiff's land; In *United States v. Causby*, 328 U. S. 256, this Court required the federal government to compensate an adjacent land owner for damages incurred by military overflights from a military airfield. *United States v. California*, 332 U. S. 19, *United States v. Louisiana*, 339 U. S. 699 and *United States v. Texas*, 339 U. S. 707, all deal with attempted state regulation over oil and gas rights in the marginal coastal seas. Respondents respectfully submit that none of the foregoing citations are applicable to the case currently before this Court.

It is the position of respondents that petitioners have

advanced no compelling reason which would require the issuance of a writ of certiorari. The decisions below are in accordance with the law as stated by this Court, and the specific questions petitioners attempt to raise have been decided by this Court and require neither amplification or clarification.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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